

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:

Review of the Section 251 Unbundling
Obligations for Incumbent Local Exchange
Carriers

CC Docket No. 01-338

Implementation of the Local Competition
Provisions of the Telecommunications Act of
1996

CC Docket No. 96-98

Deployment of Wireline Services Offering
Advanced Telecommunications Capability

CC Docket No. 98-147

REPLY COMMENTS OF SBC ON PETITIONS FOR RECONSIDERATION

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SUMMARY

The Commission should clarify its rules in three respects in order to fully advance its objective of promoting investment in broadband facilities. *First*, the Commission should clarify that ILECs are not required to provide unbundled access to any packetized transmission facilities. In particular, there is no basis for the CLECs' claims in their comments that the *Triennial Review Order* requires ILECs to unbundle packetized DS1 and DS3 loops serving enterprise customers. Nothing in the *Triennial Review Order* contains such a requirement. *Second*, the Commission should clarify that neither its network modification rules nor its hybrid loop unbundling rules require an ILEC to design, reconfigure, or modify its network to facilitate CLEC requests for TDM functionality—including installing a multiplexer—if the ILEC would not do so for its own customers. CLECs are simply mistaken in their comments that the *Triennial Review Order* requires an ILEC to do so. *Finally*, the Commission should limit the ILECs' obligations to unbundle enterprise dark fiber loops only to those loops that were deployed as of the effective date of the *Triennial Review Order*. CLECs face the same economic and operational barriers as ILECs in the deployment of new dark fiber, and there is no basis to require ILECs to unbundle facilities for which they face the same risk and opportunity as CLECs. Failure to make these clarifications or rule changes will impede the Commission's and the Act's goal of fostering the delivery of advanced, broadband services to all Americans.

The Commission also should grant BellSouth's petition as to BOC obligations under section 271 of the Act. It is incorrect, as the CLECs claim, that the D.C. Circuit's *USTA* decision is irrelevant to the question of unbundling obligations under section 271. The *USTA* decision confirms that all unbundling—whether under the auspices of section 251 or section 271—has costs. Accordingly, the Commission should reconsider its decision that section 271 imposes

independent unbundling obligations on BOCs. Even if the Commission does not do so, it should, at a minimum, clarify that section 271 does not require BOCs to combine or commingle section 271 items. The CLECs admit that section 271 itself contains no such requirement, and their arguments as to Supreme Court's interpretation of the various non-discrimination provisions of the Act are unavailing.

Finally, the Commission should deny the requests of various wireless carriers that the Commission require unbundling of entrance facilities. As with the wireless carriers' petitions, none of the comments address the core rationale of the Commission's decision on this issue—that the Act only requires an ILEC to unbundle facilities within its network. It is beyond dispute that entrance facilities are not within ILECs' networks. Accordingly, the Commission should deny the wireless carriers' petitions for reconsideration.

TABLE OF CONTENTS

	<u>Page</u>
I. NOTHING IN THE <i>TRIENNIAL REVIEW ORDER</i> REQUIRES ILECS TO PROVIDE UNBUNDLED ACCESS TO PACKET SWITCHING OR PACKETIZED TRANSMISSION FACILITIES	1
II. THE COMMISSION SHOULD CLARIFY THAT ILECS NEED NOT MODIFY OR DESIGN THEIR PACKET SWITCHED NETWORKS TO PROVIDE TDM CAPABILITY FOR ENTERPRISE CUSTOMERS.....	5
III. THE COMMISSION SHOULD LIMIT UNBUNDLING OF DARK FIBER ONLY TO LOOPS DEPLOYED AS OF THE EFFECTIVE DATE OF THE <i>TRIENNIAL REVIEW ORDER</i>	9
IV. THE REQUIREMENTS OF SECTION 271'S COMPETITIVE CHECKLIST ITEMS 4-6 AND 10 ARE NOT INDEPENDENT OF SECTIONS 251'S UNBUNDLING OBLIGATIONS	11
V. THE ACT DOES NOT MANDATE THAT BOCS COMBINE SECTION 271 ELEMENTS.....	14
VI. THE COMMISSION SHOULD AFFIRM THAT ENTRANCE FACILITIES NEED NOT BE UNBUNDLED AND THAT CMRS CARRIERS ARE SUBJECT TO THE COMMINGLING ELIGIBILITY REQUIREMENTS	18
VII. THE COMMISSION SHOULD DISMISS THE LATE FILED PETITIONS FOR RECONSIDERATION MASQUERADING AS COMMENTS.....	19

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**I. NOTHING IN THE *TRIENNIAL REVIEW ORDER* REQUIRES ILECS TO
PROVIDE UNBUNDLED ACCESS TO PACKET SWITCHING OR
PACKETIZED TRANSMISSION FACILITIES**

A number of CLECs contend that the Commission required ILECs to provide unbundled access to DS1 and DS3 loops using packet switched technology for enterprise customers.¹ In particular, they argue that, because the Commission explained its rationale for declining to require unbundling of “packetized” loops in the mass market loop section of the order, its decision not to unbundle any packet switched loops was limited only to “mass market loops.”²

¹ *AT&T Comments* at 5; *NewSouth Comments* at 7; *Sprint Comments* at 17.

² *AT&T Comments* at 5; *NewSouth Comments* at 7.

They further contend that footnote 956 of the order specifically requires ILECs to provide DS1 and DS3 loops “regardless of the technology used to provide such loops.”³ The CLECs maintain that they may therefore obtain unlimited access to DS1 and DS3 loops, including packet switched DS1s and DS3s, to serve enterprise customers. These claims should be rejected.

As an initial matter, arguments that the *Triennial Review Order* actually requires unbundling of packetized DS1 and DS3 loops to enterprise customers are just plain wrong. To the contrary, in the packet switching section of the *Triennial Review Order*, the Commission expressly concluded, “we decline to unbundle packet switching as a stand-alone network element.”⁴ There is no equivocation in this statement, no qualifications or exceptions. It would be wholly irrational, therefore, to suggest that footnote 956 creates an exception to such a categorical pronouncement.

Indeed, the holding is categorical for good reason. As the Commission explained, the evidence demonstrates *on a nationwide basis* that CLECs are not impaired without access to packet switching. The Commission thus noted, “a wide range of competitors are actively deploying their own packet switches, including routers and DSLAMs to serve both the enterprise and mass markets, and . . . these facilities are much cheaper to deploy than circuit switches.”⁵ The Commission therefore expressly rejected CLEC claims that it should retain a limited exception to the packet switching unbundling exemption where the ILEC has deployed digital

³ *AT&T Comments* at 5; *NewSouth Comments* at 7. SBC notes that footnote 956 makes no reference to DS3s. In any event, as discussed herein, the CLECs’ claims cannot be reconciled with the Commission’s decision to eliminate any unbundling of packet switching technology.

⁴ *Triennial Review Order* ¶ 537. *See also id.* ¶ 7 (“Incumbent LECs are not required to unbundle packet switching[.] . . . The Order eliminates the current limited requirement for unbundling of packet switching.”)

⁵ *Id.* ¶ 538.

loop carrier systems, holding, in terms that could not be clearer, “we decline to permit any limited exceptions to our decision not to unbundle packet switching.”⁶ The Commission also found that requiring ILECs to unbundle packet switching would be inconsistent with the objectives of section 706 of the Act.⁷

Despite the unequivocal nature of the Commission’s holding, CLECs maintain that the holding is, in fact, quite limited. Seizing upon the fact that the Commission set forth its impairment analysis for packetized loops in the mass market section of the order, they maintain that packetized loops must be unbundled for all enterprise customers. This is rubbish.

The Commission made clear that its separate discussions of enterprise and mass market customers in the loop sections of the order were merely a matter of analytical *convenience*, reflecting the fact that customers associated with each class generally use different types of loops.⁸ The Commission expressly stated that it was not thereby creating customer-based distinctions in its loop unbundling rules: “While we adopt loop unbundling rules *specific to each loop type*, our unbundling obligations and *limitations* for such loops do not vary based on the customer to be served.”⁹ Moreover, consistent with the text of the Commission’s order, the loop unbundling rules themselves make no customer-based distinctions. Thus, the Commission’s

⁶ *Id.* ¶ 540 (emphasis added). The Commission noted that its rules covering such situations were discussed in Part VI.A.4.a. (v) of the order, which addressed hybrid loops. *Id.*

⁷ *Id.* ¶ 537.

⁸ *Triennial Review Order* ¶¶ 209 and 210 (noting that “customers associated with the mass market typically use different types of loop facilities than customers generally associated with the enterprise market,” and that “our market classifications allow us to conduct our impairment analyses for various loop *types* at a granular level”) (emphasis added).

⁹ *Id.* ¶ 210 (further noting that “a competitive LEC faces the same economic considerations in provisioning a DS1 loop to a large business customer typically associated with the enterprise

limitations on loop unbundling, including its determination not to unbundle packet switched DS1s and DS3s, apply irrespective of the customer served.

The claim that the exemption from unbundling for packet switched DS1 and DS3 loops in the hybrid loop rules is limited only to mass market customers is further belied by the Commission's observation that such loops are purchased by enterprise, not mass market, customers. In explaining the market classifications it adopted for analytical purposes, the Commission concluded that mass market (residential and small business) customers typically purchase "analog loops, DS0 loops or loops using xDSL-based technologies," which the Commission said it would address "as part of [its] mass market analysis."¹⁰ The Commission found that "enterprise" customers, in contrast, typically purchase "high capacity loops, such as DS1, DS3, and OCn capacity loops," which the Commission said it would address "as part of [its] enterprise market analysis."¹¹ Plainly, the Commission would not have engaged in an extensive analysis of whether ILECs should be required to unbundle packet switched DS1 and DS3 hybrid loops for mass market customers when it concluded that such customers do not purchase DS1 and DS3 loops in any event. Nor could the Commission have proudly proclaimed, as it did, that the order "eliminate[s] most unbundling requirements for broadband"¹² if the relief given were as hollow as the CLECs would have it.

Although the rules are clear that ILECs need not unbundle any packetized transmission facility features, functions or capabilities to serve any customer (including enterprise customers),

market that it faces in provisioning that same loop to a very small business or residential customer typically associated with the mass market").

¹⁰ *Id.* ¶ 209.

¹¹ *Id.* (emphasis added).

¹² *Id.* ¶ 4.

in light of CLEC claims to the contrary, and the likelihood that they will peddle these claims to state regulators, the Commission should clarify that its rules do not require ILECs to unbundle any packetized transmission facilities. In their separate statements regarding the *Triennial Review Order*, Chairman Powell and Commissioners Abernathy and Martin asserted that the order took bold steps to stimulate investment in next generation networks by sweeping away unbundling obligations that create unwarranted obstacles to the deployment of broadband infrastructure and services.¹³ But if ILECs must provide CLECs access to any packet switched transmission facilities to serve enterprise customers, the *Triennial Review Order* substantially expands, rather than narrows, an ILEC's obligation to unbundle broadband facilities.¹⁴ In light of the Chairman's and Commissioners' clear statements to the contrary, SBC does not believe the Commission intended to expand the unbundling requirements for broadband and thus further undermine ILEC and CLEC incentives to invest in next generation infrastructure. Accordingly, the Commission should clarify that its rules do not require ILECs to unbundle packetized transmission facilities.

II. THE COMMISSION SHOULD CLARIFY THAT ILECS NEED NOT MODIFY OR DESIGN THEIR PACKET SWITCHED NETWORKS TO PROVIDE TDM CAPABILITY FOR ENTERPRISE CUSTOMERS

¹³ See *Separate Statement of Chairman Michael J. Powell* at 1; *Separate Statement of Commissioner Kathleen Q. Abernathy* at 1 ("I strongly support the decision to create a national policy that exempts new broadband investment from unbundling at deeply discounted TELRIC rates."); and *Commissioner Kevin J. Martin's Press Statement on the Triennial Review* at 2 (noting that the order "provides sweeping regulatory relief for broadband and new investments," including deregulating "any fiber used with new packet technology").

¹⁴ Under the *UNE Remand Order*, ILECs were required to provide unbundled access to packet switched loops only where the following conditions were met: the ILEC had deployed DLC systems; there were no copper loops capable of supporting xDSL services available; the ILEC did not permit a CLEC to deploy a DSLAM at the remote terminal; and the incumbent had deployed packet switching capability for its own use. *UNE Remand Order*, Appendix C at 6.

CLECs oppose BellSouth's request that the Commission clarify through reiteration that ILECs can deploy their next generation networks (including packet switched hybrid loops) in the most efficient manner possible, and thus cannot be required to design, reconfigure or modify such networks to facilitate CLEC requests for TDM capability, such as by adding a TDM multiplexer if it would not do so for its own customers.¹⁵ CLECs argue that BellSouth's request is contrary to the network modification rules, which, they claim, require ILECs to modify or reconfigure their packet switched hybrid loops to provide TDM functionality by adding TDM multiplexers on demand by CLECs, even if ILECs would not do so for their own customers.¹⁶ They further contend that granting BellSouth's request would be inconsistent with the hybrid loop unbundling requirements because ILECs could deploy next generation networks without TDM capability and thus "eliminate the existing rights" of CLECs to obtain access to hybrid loops capable of providing DS1 and DS3 service to customers.¹⁷ These claims are a distortion of the *Triennial Review Order* (indeed, CLECs themselves have acknowledged elsewhere that the hybrid loop unbundling rules "confine[] CLECs to the 'legacy' [TDM] transmission

¹⁵ See *AT&T Comments* at 15; *Allegiance, et. al Comments* at 2; *MCI Comments* at 13; *ALTS Comments* at 28; *Sprint Comments* at 17.

¹⁶ *MCI Comments* at 13 (arguing that an ILEC must, upon request, deploy new multiplexers that provide TDM functionality for hybrid loops, even if the ILEC would not do so for its own customers, because the Commission "has found that incumbent LECs routinely attach multiplexers to existing loops, and that performing such functions is easily accomplished"). See also *Sprint Comments* at 17-18 (deploying a TDM multiplexer is a routine, network construction or modification required of any ILEC, even in next generation, hybrid technology networks).

¹⁷ See *MCI Comments* at 11-12; *Allegiance, et. al. Comments* at 1-2; *AT&T Comments* at 16-17; *ALTS Comments* at 29.

capability of hybrid copper-fiber loops, *to the extent it continues to exist*”¹⁸) and underscore the need for the Commission to clarify its loop unbundling rules as BellSouth requests.

As an initial matter, CLECs mischaracterize the network modification rules. As the Commission made clear, those rules require an ILEC to perform only those activities that it would undertake for its own customers.¹⁹ As a consequence, the fact that ILECs routinely attach multiplexers to certain types of loops, or that attaching multiplexers to existing loops is easily accomplished,²⁰ is completely beside the point. If an ILEC would not attach a TDM multiplexer for its own customers, it has no obligation to do so for CLECs.

CLECs also are wrong in arguing that ILECs must incorporate TDM functionality into future-deployed hybrid loop architectures because of the Commission’s conclusion that section 251(c)(3) prohibits ILECs from taking any action that “has the effect of disrupting or degrading access to the TDM-based features, functions and capabilities of hybrid loops.”²¹ As the Commission itself reiterated in the *Triennial Review Order*, section 251(c)(3) requires ILECs to provide unbundled access only to their “existing network[s],” it does not require ILECs to “substantially alter their networks” to satisfy CLEC demands for access.²² Moreover, in

¹⁸ Joint Proposal of Competitive Local Exchange Carriers for Briefing Format and Schedule at 9-10, *United States Telecom Ass’n v. FCC*, Nos. 00-1012; 03-1310 (D.C. Cir. Nov. 10, 2003).

¹⁹ *Id.* ¶¶ 632, 634 (“our operating principle is that incumbent LECs must perform all loop modification activities that it performs for its own customers”); 47 C.F.R. § 51.319(a)(8)(ii).

²⁰ *MCI Comments* at 13; *Sprint Comments* at 17.

²¹ *See MCI Comments* at 11-12; *Allegiance, et. al. Comments* at 1-2; *AT&T Comments* at 16-17.

²² *Triennial Review Order* ¶ 630 (noting that the Eighth Circuit held that section 251(c)(3) requires “unbundled access only to an incumbent LEC’s existing network – not a yet unbuilt superior one”). AT&T claims that requiring ILECs to add TDM functionality to hybrid loops where it has not been deployed would not provide “superior” access, but rather would afford CLECs only “inferior” access to the ILECs’ networks. *AT&T Comments* at 17. But the issue is not whether TDM technology in some sense is “inferior” to packet switching. To the contrary, it

explaining the line it drew in adopting the hybrid loop rules, the Commission stated that the rules would maintain “the *existing* rights competitive LECs have to obtain unbundled access to hybrid loops capable of providing DS1 and DS3 services.”²³ The Commission thus made clear that its prohibition against any action that could “disrupt” or “degrade” TDM functionality applied only to ILECs’ existing hybrid loops, not those which they may deploy in future.

In any event, ILEC deployment of next generation hybrid loops without TDM capability will not “disrupt” or “degrade” CLEC access to any existing hybrid loops with TDM functionality, nor would it deprive CLECs of any “existing rights” of access to TDM capable loops. Even if CLECs could not obtain unbundled access to packet switched hybrid loop facilities, they still would retain access to any previously available TDM-capable loop alternatives within the ILECs’ networks, including ILEC copper subloops and spare home run copper loop facilities, unless those facilities were removed.²⁴ Absent the removal of those facilities, CLECs thus would retain all their “existing” rights of access to ILEC loops with no disruption or degradation in access to TDM functionality.²⁵

is whether section 251(c)(3) requires ILECs only to provide access to their *existing* networks, subject to routine modifications (which the Commission has defined as those the ILEC would perform for its own customers), rather than requiring them to alter their networks substantially to accommodate CLEC requests for access. *Triennial Review Order* at ¶ 630 (holding that, under section 251(c)(3), ILECs are required to provide unbundled access “only to [their] existing network[s],” and “cannot be required ‘to *alter substantially* their networks’) (emphasis in original) (quoting *Iowa Utils. Bd. v. FCC*, 120 F.3d at 813).

²³ *Triennial Review Order* ¶ 294 (emphasis added). The Commission observed that ILECs typically provide such “TDM-based services” using the “the features, functions, and capabilities of their networks *as deployed to date*.” *Id.*

²⁴ See *Triennial Review Order* ¶ 291 (noting that copper subloop unbundling “adequately addresses the impairment competitive LECs face so that intrusive unbundling requirements” for hybrid loops is “not necessary”).

²⁵ The only circumstances under which TDM-capable copper loops would not be available as an alternative to packet switched hybrid loops are in greenfield situations or where the ILEC retires

Moreover, the CLECs' interpretation (that the loop unbundling rules require ILECs to deploy TDM functionality in next generation hybrid loops) would discourage deployment of advanced telecommunications capability, contrary to the express requirements of section 706.²⁶ In the *Triennial Review Order*, the Commission recognized that hybrid loops are "an important step towards the deployment of a fiber-based network capable of supporting a wide array of advanced telecommunications and other services."²⁷ It further concluded that extending unbundling obligations to next generation packet switched hybrid loops would "blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities."²⁸ Requiring ILECs to design or reconfigure next generation hybrid loop infrastructure by adding TDM functionality where they would not otherwise do so would increase ILEC costs by forcing them to adopt inefficient network designs, undermining their incentives to upgrade their networks to provide broadband services to all Americans. The Commission therefore should reject the CLECs' claims to the contrary, and clarify that the network modification rules do not require an ILEC to deploy a multiplexer that provides TDM functionality—or perform any other network modifications—if an ILEC has not, or would not, do so for its own customers.²⁹

copper. But even in those cases, CLECs would retain access to copper subloops. In any event, for the reasons articulated in the *Triennial Review Order* with respect to greenfield fiber loop deployments, CLECs are not impaired without access to greenfield hybrid loops. And the Commission's copper retirement rules ensure that ILECs and CLECs can work together to ensure that CLECs maintain access to loop facilities. *Triennial Review Order* ¶ 281.

²⁶ *Triennial Review Order* ¶ 290.

²⁷ *Id.* ¶ 285.

²⁸ *Id.* ¶ 288.

²⁹ In particular, the Commission should clarify the network modification rules in accordance with Attachment A to SBC's comments.

III. THE COMMISSION SHOULD LIMIT UNBUNDLING OF DARK FIBER ONLY TO LOOPS DEPLOYED AS OF THE EFFECTIVE DATE OF THE *TRIENNIAL REVIEW ORDER*

CLECs also oppose BellSouth's petition to eliminate unbundling of newly deployed fiber loop plant.³⁰ These CLECs claim that the Commission's impairment analysis for dark fiber applies equally to new and old fiber, and that impairment with respect to a particular strand of dark fiber does not disappear simply because it was deployed after the effective date of the order.³¹ CLECs further claim that ILECs and CLECs are not similarly situated in deploying new fiber because a BOC has advantages of incumbency, including ubiquitous plant, contiguous territory and an existing customer base.³²

The Commission, however, already has rejected these claims. As discussed in SBC's Comments in support of BellSouth's petition, the Commission has concluded, correctly, that ILECs and CLECs face the same economic and operational barriers to deployment of new fiber infrastructure, and that CLECs actually enjoy certain advantages in the form of lower labor costs and state-of-the-art back office systems.³³ Moreover, CLECs cannot be impaired without access to new fiber loop plant that has not yet been deployed, and which may never be deployed, if ILECs are required to incur all the risks but socialize all the benefits of their investment in such plant.

In any event, requiring ILECs to unbundle newly deployed dark fiber loops for "enterprise" customers, while relieving ILECs of the same obligation for "mass market"

³⁰ *MCI Comments* at 14-16; *Sprint Comments* at 18-19; *ALTS Comments* at 9; *Allegiance, et. al. Comments* at 23.

³¹ *Allegiance, et al. Comments* at 23. *See also MCI Comments* at 14-16; *Sprint Comments* at 18.

³² *Sprint Comments* at 18; *ALTS Comments* at 9.

customers, makes no sense. While, as the Commission recognized, carriers face the same economic considerations in provisioning a loop to a large business customer as they do in provisioning the same loop to a small business or residential customer,³⁴ the revenue opportunities associated with serving large business customers is significantly greater.³⁵ It is precisely for this reason that CLECs have targeted such customers. As Verizon observes, the record in the *Triennial Review* proceeding established that, while fiber deployed to the mass market still is in the early stages of deployment, CLECs already have widely deployed fiber to serve enterprise customers.³⁶ Plainly, there can be no justification for requiring ILECs to unbundle newly deployed fiber loop facilities to serve the very customers CLECs are most likely to reach with their own facilities. The Commission therefore should grant BellSouth's petition to eliminate unbundling of newly deployed fiber loop plant.

IV. THE REQUIREMENTS OF SECTION 271'S COMPETITIVE CHECKLIST ITEMS 4-6 AND 10 ARE NOT INDEPENDENT OF SECTION 251'S UNBUNDLING OBLIGATIONS

As BellSouth demonstrated in its petition, the Commission erred in holding that the BOCs' obligations under items 4-6 and 10 of section 271's Competitive Checklist are independent of the unbundling obligations in section 251(c)(3).³⁷ In their comments opposing BellSouth's petition, the CLECs ignore the fundamental rationale of the *USTA* decision—that all unbundling has costs. Proper deference to the D.C. Circuit's reasoning compels the conclusion

³³ *SBC Comments* at 6-7.

³⁴ *Triennial Review Order* ¶ 210.

³⁵ *Id.* ¶ 303.

³⁶ *Verizon Comments* at 27-28.

³⁷ *BellSouth Petition* at 10-15.

that BOC obligations under Competitive Checklist items 4-6 and 10 coincide with the unbundling obligations under section 251.³⁸

AT&T is incorrect that the *USTA* decision is “irrelevant to the scope of § 271 unbundling.”³⁹ AT&T and the other parties who advance this argument offer no support for it other than the obvious fact that section 271 is a separate statutory provision than section 251 and the facile claim that the “D.C. Circuit did not address the unbundling obligations imposed on BOCs by section 271.”⁴⁰ That the court did not cloak its analysis specifically in the mantle of section 271, however, does not mean that it did not address the underlying issue, or that its analysis and conclusions do not apply equally and with the same vigor. The court determined that compulsory unbundling—not merely section 251 unbundling, but simply unbundling—“is

³⁸ In evaluating BOC compliance with checklist items 4-6, the Commission repeatedly has looked to BOC compliance with corresponding unbundling rules under section 251. In evaluating BOC compliance with checklist items 4-6, the Commission repeatedly has looked to BOC compliance with corresponding unbundling rules under section 251. *See, e.g., In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, *Memorandum Opinion and Order*, 16 FCC Rcd 6237 ¶ 241 (2001). (“To satisfy its obligations under [section 271(c)(2)(B)(vi)], an applicant must demonstrate compliance with the Commission rules effective as of the date of the application relating to unbundled local switching.”) As with its dismissal of the D.C. Circuit’s *USTA* reasoning, it is overly picayune for AT&T to suggest that the Commission’s 271 decisions “did not even purport to address the issue.” *AT&T Petition* at 24 n. 14; *see also MCI Comments* at 19-20; *Z-Tel Comments* at 5-8. The fact is that in determining whether the BOCs had satisfied Competitive Checklist items 4-6 and 10, the Commission looked no further than the BOCs’ compliance with section 251 and conducted no independent analysis of the obligations under section 271. The Commission’s analytical approach thus demonstrates its understanding that section 271 creates no independent unbundling obligations.

³⁹ *AT&T Comments* at 24.

⁴⁰ *PACE Comments* at 5; *see also MCI Comments* at 19; *Z-Tel Comments* at 8-9.

not an unqualified good.”⁴¹ It therefore disposed of any notion that section 271 unbundling retains any value separate and apart from section 251 unbundling.

In addition, when the court held, “[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities,”⁴² it did not mean that only section 251 unbundling imposes cost. Rather, whether as a UNE under section 251 or an item on the section 271 Competitive Checklist, *any* form of government mandated unbundling imposes costs on society.⁴³ Further, in holding that “*nothing* in the Act appears a license to the Commission to inflict on the economy [these costs] under conditions where it had no reason to think doing so would bring on a significant enhancement of competition,”⁴⁴ it did not limit its pronouncement to section 251 unbundling. Indeed, by specifically using the phrase, “*nothing in the Act*,” the court encompassed within the scope of its holding both sections 251 and 271. AT&T and its fellow UNE-P CLECs are thus wrong that the *USTA* decision does not address this issue. On the contrary, *USTA* compels the conclusion that, once the Commission determines that carriers are not impaired without unbundled access to an element, it should not require BOCs to provide that same element as a

⁴¹ *United States Telecom Assoc. v. FCC*, 290 F.3d, 415, 429 (D.C. Cir. 2002).

⁴² *USTA*, 290 F.3d at 427.

⁴³ The fact that Competitive Checklist items must be provided only by BOCs (*Pace Comments* at 5; *Sprint Comments* at 21), and at different rates, terms, and conditions than section 251 UNEs (*AT&T Comments* at 23) is irrelevant. The relevant focus under *USTA* is the balancing of the costs imposed as result of the compulsory nature of unbundling requirements, not the scope or magnitude of such obligations. The lynchpin of a no-impairment finding under section 251 is a determination by the Commission that competitive entry is economically and operationally feasible without unbundling—of any flavor—and it necessarily follows that the cost of unbundling—whether compelled by section 251 or section 271—in the absence of impairment would *not* be counterbalanced by a significant enhancement of competition.

⁴⁴ *USTA*, 290 F.3d at 429.

section 271 Competitive Checklist item. The Commission should declare that section 271's Competitive Checklist items 4-6 and 10 are not independent of section 251's unbundling obligations.

With respect to the specific question of whether section 271 contains any independent broadband unbundling obligation, several CLECs also argue that the Commission can not consider the policy objectives embodied in section 706, because section 271 does not contain the same “at a minimum” language as section 251.⁴⁵ That is absurd. Just as the rationale in *USTA* applies to compulsory unbundling under any provision of the Act, section 706 is a statement of general policy and applies to all provisions of the Act. Congress surely could not have intended to frustrate under section 271 the broadband deployment objectives that it intended to promote through section 251. Compulsory unbundling of broadband—whether under section 251 or section 271—equally frustrates that objective. It would, in short, fatally undermine the Commission's avowed goal of creating a “race to build next generation networks,” with the result of “increased competition in the delivery of broadband services.”⁴⁶ With respect to broadband specifically, and more broadly each of Competitive Checklist items 4-6 and 10, the Commission should determine that the BOCs' obligations under section 271 are not independent of section 251's unbundling obligations.

V. THE ACT DOES NOT MANDATE THAT BOCS COMBINE SECTION 271 ELEMENTS

In its *Errata*, the Commission removed from the first sentence of paragraph 584 of the *Triennial Review Order* the reference to “any network elements unbundled pursuant to section 271,” from the discussion of its commingling rules. In doing so, the Commission made clear that

⁴⁵ See *ALTS Comments* at 25; *AT&T Comments* at 24; *MCI Comments* at 21.

that RBOCs are not required to combine section 271 items with section 251 UNEs.⁴⁷ In addition, notwithstanding Sprint’s claim to the contrary,⁴⁸ the *Triennial Review Order* does specifically and affirmatively say that BOCs are not required under section 271 “to combine network elements that no longer are required to be unbundled under section 251.”⁴⁹ Thus, the Commission’s rules do not require BOCs to provide combinations of (1) UNEs and section 271 items, or (2) two or more section 271 items. To avoid any further confusion as to this matter, the Commission should so clarify.

The need for clarification is illustrated by the comments of AT&T and its UNE-P cohorts, who argue that the “plain text of the Act mandates that the BOCs ‘combine’ section 271 elements.”⁵⁰ Principally, the UNE-P carriers argue that the Supreme Court held in *Iowa Utilities Board* that the non-discrimination provisions of sections 201 and 202 of the Act require BOCs to provide UNE combinations in perpetuity.⁵¹ That simply is not true. At most, the Court has held that it was within the Commission’s *discretion* to adopt Rule 315. It has never held that the Act itself requires the provision of UNE combinations, and it certainly has never addressed the more

⁴⁶ *Triennial Review Order* ¶ 272.

⁴⁷ That sentence now says: “As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any services offered for resale pursuant to section 251(c)(4).”

⁴⁸ *Sprint Comments* at 23.

⁴⁹ *Triennial Review Order* ¶ 656 n. 1990.

⁵⁰ *AT&T Comments* at 24.

⁵¹ *AT&T Comments* at 25; *see also* *Z-Tel* at 16; *Covad Comments* at 16. None of the UNE-P carriers claim that section 271 itself contains any requirement that BOCs provide section 271 items in combination, either with other section 271 items or with section 251 UNEs.

specific questions of whether BOCs must provide combinations of UNE and section 271 items or combinations of individual section 271 items.⁵²

In *Iowa Utilities Board*, the Court held only that it was reasonable for the Commission to conclude that the Act does not require the leasing of section 251 UNEs in “discrete pieces.”⁵³ It based this conclusion on its determination that the Act “does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form.”⁵⁴ There is a vast difference, however, between the Court holding that the Act does not require the provision of UNEs only in discrete pieces, and the Act affirmatively requiring the provision of combinations of elements. The Court, in fact, has never found that any section of the Act requires the provision of combinations of elements.⁵⁵

To the contrary, the Court has found that the Act does *not* require the Commission’s section 251 UNE combinations rules. Specifically, with respect to Commission Rule 315(b)—

⁵² As an initial matter, the Commission did not rely on the non-discrimination provisions of the Act in promulgating Rule 315. Rather, the Commission relied on the language in section 251(c)(3) requiring ILECs to provide access to UNEs “in a manner that allows requesting carriers to combine such elements in order to provide” a telecommunications service. *Local Competition Order* ¶¶ 292-292. As the Commission found in the *Triennial Review Order*, there is no similar language—indeed, no language at all with the word “combine” in it—in section 271. *Triennial Review Order* ¶ 656 n. 1990.

⁵³ *Iowa Utilities Bd.*, 119 S.Ct. at 737.

⁵⁴ *Id.*

⁵⁵ The Court, moreover, clearly distinguished *unbundling* requirements from *combinations* requirements. See *Verizon Comm., et al. v. FCC, et al.* 122 S.Ct. 1646,1683 (2002) (“‘Bundling’ and ‘combination’ are related but distinct concepts.”) “Bundling is about lease pricing. To provide a network element ‘on an unbundled basis,’ is to lease the element, however described, to a requesting carrier at a stated price specific to that element.” *Id.* On the other hand, the Commission’s combination rules require a “mechanical connection of physical elements within an incumbent’s network, or the connection of a competitive carrier’s element within the incumbent’s network ‘in a manner that would allow a requesting carrier to offer the telecommunications service.’” *Id.*, quoting *Local Competition Order* ¶ 294 n. 620.

which prohibits incumbents from separating elements that they currently combine—the Court found, “[t]he reality is that § 251(c)(3) is *ambiguous* on whether leased network elements may or must be separated.”⁵⁶ Similarly, in *Verizon*, the Court read “the language of § 251(c)(3) as *leaving open* who should do the work of combination.”⁵⁷ The Court found only that the Commission’s Rule 315(b) was “entirely rational, finding its basis in § 251(c) (3)’s nondiscrimination requirement.”⁵⁸ The fact that Commission Rule 315(b) is “rational” and has a “basis” in the section 251(c) (3)’s non-discrimination requirement, however, does not mean that the Act *requires* UNE combinations, and certainly does not mean that section 271 items are subject to the same standard or analysis.⁵⁹ The fact is, the Court has never disagreed that the concept of UNE combinations was and remains a Commission creation, not a requirement of the Act.⁶⁰ The Commission was thus well within its authority in determining in the *Triennial Review*

⁵⁶ *Id.* at 1684, 1685. (Emphasis added.)

⁵⁷ *Verizon* at 1685. (Emphasis added.)

⁵⁸ *Iowa Utilities Bd.*, 119 S.Ct. at 737; *accord Verizon* at 1685 (under *Chevron*, fact that statutory language is open “leaves the FCC’s rules intact unless the incumbents can show them to be unreasonable.”)

⁵⁹ AT&T’s claim that the “separate nondiscrimination requirement of § 251(c)(3)” requires combinations of 271 elements is the height of tortured statutory interpretation. *AT&T Comments* at 25. Section 251(c)(3) does not contain a general non-discrimination requirement independent of its requirement that ILECs provide UNEs, and AT&T can not bootstrap the particulars of that provision onto the obligation to provide non-UNE section 271 Competitive Checklist items. In any event, just as the non-discrimination provisions of sections 201 and 202 do not require combination of UNEs, neither does the non-discrimination requirement of section 251(c)(3).

⁶⁰ AT&T also argues that BOCs must provide combinations of section 251 UNEs and section 271 items because section 251(c)(3) requires the provision of UNEs at any technically feasible point. In support of its claim, AT&T disingenuously relies upon ¶ 581 of the *Triennial Review Order*, in which the Commission found that an ILEC’s wholesale services are a technically feasible means of providing non-discriminatory access to UNEs and UNE combinations. *AT&T Comments* at 25. AT&T fails to mention that three paragraphs later, the Commission, in its *Errata*, specifically eliminated section 271 elements from the wholesale services that BOCs must commingle with section 251 UNEs.

Order that section 271 items need not be provided in combination. To end any dispute on this matter, it should clarify through reiteration that no section 271 item need be provided in combination with any other section 271 item or with any section 251 UNE.

Finally, the Commission should clarify that the rates, terms, or conditions of items provided under section 271 are not subject to review by the states. Z-Tel grossly misreads the *Errata*'s changes to paragraph 584 and footnote 1990 to suggest that the states may determine the rates, terms, and conditions "under which a CLEC may access elements that must be unbundled under section 271, including issues related to commingling."⁶¹ The Commission should put to rest any such notion in no uncertain terms.⁶² As the Commission said in the *Triennial Review Order*, Sections 201 and 202 of the Act provide the only authority to review the rates, terms, and conditions of any items provided by a BOC under the auspices of section 271.⁶³ Sections 201 and 202 are grants of federal authority only and confer no jurisdiction upon the states to review the rates, terms, or conditions of any such items. The Commission should immediately and affirmatively forestall any claim to the contrary.

VI. THE COMMISSION SHOULD AFFIRM THAT ENTRANCE FACILITIES NEED NOT BE UNBUNDLED AND THAT CMRS CARRIERS ARE SUBJECT TO THE COMMINGLING ELIGIBILITY REQUIREMENTS

Several parties filed comments in support of the CMRS carriers' petitions for reconsideration of the Commission's decision not to unbundle entrance facilities. For the most part, they repeat the same arguments in the CMRS carriers' original petitions—that entrance facilities to wireless base stations should be unbundled because they are really loops, and that the

⁶¹ *Z-Tel Comments* at 15.

⁶² At the TRIP workshop held at the Commission on October 10, 2003, Mr. Gillan espoused essentially the same position. See <http://www.fcc.gov/realaudio/mt101003.ram>.

economics of CMRS entrance facilities are different than the economics of CLEC facilities. As SBC demonstrated in its Comments, neither argument presents any valid basis for the Commission to reconsider its decision not to unbundle entrance facilities.⁶⁴

CompTel and El Paso, in particular, focus much of their comments on the notion that CMRS entrance facilities are loops.⁶⁵ As a factual matter, they raise no new arguments and thus fare no better with that proposition than the CMRS carriers' original petitions for reconsideration. More fundamentally, as with the CMRS carriers' original petitions for reconsideration, CompTel and El Paso ignore entirely the fact that, whether it is called a loop or transport, the transmission facility that runs from an ILEC wire center to a wireless base station is not within the ILEC's network and is thus not required to be unbundled.⁶⁶ CompTel audaciously claims that the Commission left "unarticulated" the issue of whether CMRS entrance facilities qualify as loops.⁶⁷ That simply is not true. A CMRS entrance facility does not

⁶³ *Triennial Review Order* ¶¶ 656, 663-664.

⁶⁴ Although Sprint's purports to address the CMRS carriers' request for special dispensation from the commingling eligibility requirements, *Sprint Comments* at 4-6, the true focus of Sprint's comments is the creation of further special dispensation for local "data services." *Id.* As discussed below, the Commission should dismiss Sprint's late-filed petition for reconsideration, and it should affirm that its commingling eligibility requirements apply equally to CMRS and all other carriers.

⁶⁵ See *El Paso Comments* at 6-13; *CompTel Wireless Carrier Comments* at 3-6.

⁶⁶ It appears, moreover, that the CMRS carriers do not even believe their own arguments. Cellular Mobile Systems of St. Cloud refers to CRMS entrance facilities as "transport facilities" on the same page of its comments that it argues that such facilities "should also be available as a UNE loop." *St. Cloud Comments* at 2. Similarly, El Paso refers to such facilities as providing "transport back to the MTSO." *El Paso Comments* at 10.

⁶⁷ *CompTel Wireless Carrier Comments* at 3; see also *El Paso Comments* at 4.

terminate “at an end-user customer premises,” and is thus clearly not a loop.⁶⁸ The Commission clearly and specifically said, “Our determination here effectively eliminates ‘entrance facilities’ as UNEs.”⁶⁹ In short, whether labeled a loop or transport, CMRS entrance facilities are not within the ILECs’ networks and thus are not subject to mandatory unbundling.

VII. THE COMMISSION SHOULD DISMISS THE LATE FILED PETITIONS FOR RECONSIDERATION MASQUERADING AS COMMENTS

Several parties included in their comments late-filed petitions for reconsideration. In particular:

- Sprint requests that the Commission revise its commingling criteria so as not to apply to “stand alone local data services.”⁷⁰
- ALTS requests that the Commission adopt rules regarding ILEC copper facility retirement⁷¹ and rules to “improve subloop unbundling.”⁷²
- Allegiance requests that the Commission change its FTTP rules and “return to the original language in the *Triennial Review Order* that limited fiber unbundling to residences.”⁷³

The Commission should dismiss each such request. The deadline for filing petitions for reconsideration of the *Triennial Review Order* was October 2, 2003. Sprint, ALTS and Allegiance chose not to do so. Nor did any of the parties who filed timely petitions for reconsideration request any rule changes or reconsideration as requested by Sprint, ALTS, and Allegiance. Moreover, the requests fail on their own merits. Sprint’s request runs afoul of the

⁶⁸ 47 C.F.R. § 51.319(a)(1). CompTel’s argument that the wireless base station is an end user customer demarcation point is absurd. *CompTel Wireless Carrier Comments* at 4. A wireless base station does not demarcate the boundary of carrier-owned and customer-owned facilities.

⁶⁹ *Triennial Review Order* ¶ 366 n. 1116.

⁷⁰ *Sprint Comments* at 6.

⁷¹ *ALTS Comments* at 33-39.

⁷² *ALTS Comments* at 39.

very reason the Commission adopted its commingling criteria, to prevent gaming and wholesale conversion of special access to UNEs, “such as a national data network provider carrying minimal qualifying service solely to obtain UNE pricing.”⁷⁴ ALTS’ requests are based on nothing more than sheer speculation. ALTS presents no evidence of any actual problems with either subloop unbundling or copper retirement procedures. Finally, Allegiance’s request would unravel the consistency achieved by the Commission in modifying its FTTP rules to apply to “premises” rather than “residences.” Accordingly, the Commission should dismiss the late-filed petitions of each of the above requests.

CONCLUSION

⁷³ *Allegiance, et. al. Comments* at 15.

⁷⁴ *Triennial Review Order* ¶ 591.

For the reasons set forth in SBC's Comments and its Reply Comments herein, the Commission should deny the Petitions for Reconsideration filed by the CMRS carriers, Earthlink, and TSI, as well as the late-filed petitions filed by ALTS, Allegiance and Sprint. It should grant the Petitions for Reconsideration filed by BellSouth, SureWest, and the US Internet Association.

Respectfully submitted,

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